OAH Docket No. 4-0900-12264-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HEALTH

In the Matter of the Involuntary Discharge/Transfer of G.E., Pertitioner, by Southview Acres Health Care Center, Respondent	**FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 1:00 p.m. on Wednesday, June 9, 1999, at Southview Acres Health Care Center, 2000 Oakdale Avenue, West St. Paul, Minnesota.

Michelle R. Klegon, of the firm of Siegel, Brill, Greupner, Duffy & Foster, P.A., 1300 Washington Square, 100 Washington Avenue South, Minneapolis, Minnesota 55401, represented Southview Acres Health Care Center (Southview) at the hearing. G.E. (the Petitioner) was represented at the hearing by her husband. The record closed on June 9, 1999, when the hearing ended.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Health will make the final decision after reviewing the hearing record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minnesota Law,[1] the Commissioner may not make her final decision until after the parties have had access to this Report for at least ten days. During that time, the Commissioner must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument. Parties should contact the office of Jan Malcolm, Commissioner, Department of Minnesota, 85 East Seventh Place, Suite 400, St. Paul, Minnesota 55101, to find out how to file objections or present argument.

STATEMENT OF THE ISSUES

Whether the Petitioner and the Petitioner's financially responsible spouse have failed, after reasonable and appropriate notice, to pay for the care that the Petitioner has received at Southview.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner is an elderly woman who has some physical disabilities and who requires a wheel chair for mobility. Among those disabilities is a severe case of rheumatoid arthritis affecting the joints in her hands.[2]

2. The Petitioner became a resident at Southview on August 12, 1994, when her husband signed an Admissions Agreement with that facility on her behalf.[3] In signing that agreement, the Petitioner's husband certified as her financially responsible spouse:

> [t]hat he . . . has read the entire Agreement and voluntarily agrees and (sic) to be individually, as well as jointly liable to assume financial responsibility for the Resident's care and for payment of all sums due under this agreement.[4]

3. Since her admission, the Petitioner has been a private paying resident of Southview and has not been a recipient of medical assistance benefits from the State of Minnesota.[5]

4. The "case mix" system is the method for differentiating levels of resident care that the Minnesota Departments of Health (the Department) and Human Services (DHS) use to establish the rates payable for the care provided to nursing home residents within the state, including the rates payable by the Petitioner.[6] The system classifies all nursing home residents as falling into one of eleven levels of care, designated A through K, with A representing the lowest level of care and K representing the highest.[7] Nursing homes are allowed to charge higher daily rates for the care of residents with correspondingly higher level of care classifications.[8]

5. With regard to the level of care that the Petitioner would be receiving at Southview, paragraph B. 4. of the Admissions Agreement provided that:

> The payment rate under the Medical Assistance Program is determined according to the resident classification the Minnesota Department of Health assigns to each resident based on resident assessments the facility is required to submit.

> The Facility agrees to furnish the Resident with basic care services including room, board, required nursing care, personal and custodial care, major housekeeping services, social services, and such other services required by law, at the initial level of K care.
>
> An assessed level of care will be made within thirty (30) days of admission and an increase or decrease in the basic charge will be made retroactive to this admission date.

6. With regard to the rates that Southview would charge for the Petitioner's future care, the Admissions Agreement provided that:

> Daily rates are assigned by the Minnesota Department of Human Services for each care classification. The daily rate may therefore be altered for change in the level of care at any appropriate time, and the facility shall notify the Resident of any changes in care classification within a reasonable time. Any change in rate due to a change in care classification becomes effective on the first day following the facility's notification of a change in care category by the Minnesota Department of Health.
>
> The daily rate charged to residents who pay for their own care shall at all times be equal to the rate paid by Medical Assistance for the care of Medical Assistance residents.

7. At the time that the Petitioner was admitted to Southview, the facility provided her husband with two documents that it had prepared explaining generally how the case mix system works and what kinds of decisions about care needs would lead to placing a resident in each of the eleven case mix level of care classifications.[9] Those documents described the criteria that the Department uses for assigning a resident a "G" classification as whether the resident had "heavy" dependence on assistance in eating and for assigning a resident an "I" classification as whether the resident had "very heavy" dependence on assistance in eating.[10]

8. The Petitioner was assigned a "G" case mix rating for the months of July, August, September, and October, 1997.[11] Southview submitted billings for those months to the Petitioner's husband for charges for her care based on the daily rates associated with that "G" rating,[12] and the Petitioner's husband paid the charges for those four months in full.[13]

9. The Department then changed the Petitioner's case mix classification to "I," effective as of November 1, 1997, and beginning in November of 1997, Southview began submitting billings to the Petitioner's husband for charges for her care based on the daily rates associated with that "I" rating beginning in November of 1997 and continuing through June of 1999.[14]

10. From November of 1997 through early April of 1999, the Petitioner ate her breakfast in her own room but ate her noon and evening meals in a central dining room

with other residents.[15] Beginning on April 14, 1999, the Petitioner also began eating breakfast in the dining room.[16]

11. From November of 1997 through the present, either a close friend or her husband are present during most of the Petitioner's noon and evening meals in the dining room.[17]

12. While present during the Petitioner's noon and evening meals, the Petitioner's husband and friends have not observed Southview staff feeding the Petitioner or giving her direct assistance in eating.[18] During those noon and evening meals, the Petitioner generally feeds herself. Occasionally, however, friends and family will assist her in eating when she is not feeling well, for example, by placing spoonfuls of soup in her mouth.[19] On other occasions, family and friends will cut difficult foods, such as spaghetti, up for her and place it on her eating utensils.[20]

13. Beginning in the month of November 1997 and continuing until the present, the Petitioner's husband has only paid Southview the daily rates monthly charges for his wife's care that correspond to a "G" case mix rating and has refused to pay the higher daily rate and monthly charged that correspond with the "I" case mix rating that the Department has established for her.[21]

14. Between November of 1997 and the present, the Petitioner's husband has made two unsuccessful appeals to the Department to have his wife's case mix classification lowered from an "I" rating to a lower rating.[22]

15. By letter dated September 9, 1998, Southview requested the Petitioner's husband to pay the $9,923.66 in arrearages on her account as of that date.[23] The Petitioner's husband refused then and continues to refuse to pay those arrearages.[24]

16. By letter dated March 5, 1999, Southview again requested the Petitioner's husband to pay the arrearages on her account as of that date.[25] The Petitioner's husband refused then and continues to refuse to pay those arrearages.[26]

17. By letter to the Petitioner dated April 30, 1999, Southview notified the Petitioner and her husband of its intention to discharge her on June 1, 1999, because her account with Southview was $9,888.83 in arrears and over 360 days past due.[27] A copy of that letter was sent to Dakota County Adult Protection. That discharge notice provided the Petitioner with the address of the Ombudsman for Older Minnesotans and provided information about her rights to file an appeal of the decision to discharge her with the Department.[28]

18. A social worker employed by Southview has conducted discharge planning for the Petitioner and has placed her on the waiting lists for admission to six other nursing homes located in close proximity to Southview.[29] None of those six nursing homes has refused to accept her as a resident.[30]

19. On May 24, 1999, the Petitioner's husband filed an appeal on the Petitioner's behalf of Southview's decision to discharge.[31] As the bases for the appeal,

Petitioner's husband contended that his wife did not require "very heavy" assistance with eating, that Southview had been providing no such assistance, that the Petitioner had therefore been misclassified as having an "I" case mix, and that by charging Petitioner under a "I" case mix classification Southview was charging for services that it was not performing.[32] That appeal resulted in this contested case proceeding.

20. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

21. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Both Minnesota and federal law[33] give the Administrative Law Judge and the Commissioner of Health authority to conduct this proceeding, to consider whether Southview's proposed discharge of the Petitioner meets the requirements of the law, and to make findings, conclusions, and orders about that issue. But neither the Administrative Law Judge nor the Commissioner of Health have authority within the context of this proceeding to consider an appeal of the Department's determination of the Petitioner's case mix classification.

2. The Department gave the Petitioner and her husband proper and timely notice of the hearing in this matter, and the Department has complied with all of the law's substantive and procedural requirements.

3. Minnesota's "Bill of Rights" for nursing home residents provides them with the following rights with regard to discharges or transfers:

> Residents shall not be arbitrarily transferred or discharged. Residents must be notified, in writing, of the proposed discharge or transfer and its justification no later than 30 days before discharge from the facility and seven days before transfer to another room within the facility. This notice shall include the resident's right to contest the proposed action, with the address and telephone number of the area nursing home ombudsman pursuant to the Older Americans Act, section 307(a)(12). The resident, informed of this right, may choose to relocate before the notice period ends. The notice period may be shortened in situations outside the facility's control, such as a determination by utilization review, the accommodation of newly-admitted residents, a change in the resident's medical or treatment program, the resident's own or another resident's welfare, or nonpayment for stay unless prohibited by the public program or

> programs paying for the resident's care, as documented in the medical record. Facilities shall make a reasonable effort to accommodate new residents without disrupting room assignments.[34]

4. Under both federal and state law,[35] a nursing home's notice of intent to discharge a resident must include notice of the state's process for a resident's right to appeal, the reasons for the proposed discharge, and the name, mailing address, and telephone of the state's long term care ombudsman.

5. The Petitioner filed a timely appeal from Southview's notice of its intention to discharge her.

6. Under applicable federal law, a nursing home must neither transfer nor discharge a resident but must allow the resident to remain in the facility unless:

> [t]he resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this Title or Title XIX on the resident's behalf) for a stay at the facility.[36]

7. Southview has the burden of proof in this proceeding to establish by a preponderance of the evidence that the Petitioner has failed, after reasonable and appropriate notice, to pay for her stay at Southview.[37]

8. The handouts that Southview gave to the Petitioner's husband when she was admitted — namely, "Case-MIX? How Your Nursing Home Rates are Determined"[38] and "Resident Classification System Decision Tree"[39] — were not incorporated into and made part of the Petitioner's Admissions Agreement. And the level of care and services that Southview is obligated to provide to the Petitioner are not defined and established by the plain and ordinary meeting of the terms used in those handouts.

9. The level of care that Southview is obligated to provide to the Petitioner under the Admissions Agreement is established and defined by the case mix classification assigned to the Petitioner by MDH, and the services that Southview is obligated to provide to her are established and defined by the services described for that level of care by MDH's case mix system.

10. Southview has not charged the Petitioner for services not performed.

11. Before Southview issued its notice of intent to discharge the Petitioner, it gave her reasonable and appropriate notice of the arrearages that she owed to Southview and made demand for payment.

12. Southview has established by a preponderance of the evidence that the Petitioner has failed, after reasonable and appropriate notice, to pay for the Petitioner's stay at Southview.

13. Southview has engaged in a process of reasonable discharge planning on the Petitioner's behalf.

14. Applicable federal and state law now allows Southview to discharge the Petitioner from its nursing facility.

15. The Administrative Law Judge adopts as Conclusions any Findings which are more appropriately described as Conclusions.

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner deny the Petitioner's appeal and allow Southview to discharge her.

Dated this 23rd day of June 1999.

BRUCE H. JOHNSON
Administrative Law Judge

NOTICE

Under Minnesota law,[40] the Commissioner must serve her final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

The Petitioner's husband concedes that he has only been paying a portion of the charges that Southview has billed him for his wife's care since November of 1997. But he argues that he has been justified in doing so because Southview committed a breach of the Admissions Agreement by basing its charges on a need for "heavy feeding" that the Petitioner did not really require. In other words, his argument is that since November of 1997, Southview has been billing the Petitioner for services that it has not been performing. But even though the Petitioner's husband has framed this appeal in terms of an alleged breach by Southview of the Admissions Agreement, the real dispute revolves around the case mix classification that the Department has assigned to his wife. His argument is somewhat elaborate.

When the Petitioner was initially admitted to Southview, the facility provided her representative with two handouts, entitled, "Case-MIX? How Your Nursing Home Rates are Determined"[41] and "Resident Classification System Decision Tree."[42] The "Decision Tree" distinguishes case mix classification "I" as involving "Very Heavy Eating [Assistance]."[43] The Petitioner's husband argues that those two handouts became part of the Admissions Agreement, and that for purposes of the Admissions Agreement, the phrase "very heavy eating" must be interpreted according to the plain and ordinary meaning of those words and not according to the Department's technical criteria. Finally, he concludes that since the Petitioner does not require eating assistance that an ordinary person would characterize as very heavy, Southview has breached the Admissions Agreement by charging for services that it is not actually providing. Put more simply, the Petitioner's representative claims that because the Petitioner is a private paying patient, the charges for her care are defined by something that Southview specifically agreed to with her personal representative and not by how the Department might actually apply its case mix criteria to her situation.

The fundamental flaw in the Petitioner's position is that Southview was free to agree, and has agreed, to case mix classification criteria for her that differ from those that the Department has established. The whole reason for having a case mix system is to establish the rates for different levels of nursing home care for medical assistance patients. But the law prohibits Southview from having a set of rates for its private paying patients that differ from those established for its medical assistance patients.[44] So regardless of what the plain and ordinary meaning of "very heavy" eating assistance might be, Southview cannot by agreement with the Petitioner define that phrase differently than the Department defines it for purposes of its case mix system. But even if Southview could legally agree with the Petitioner to define "very heavy" eating assistance for purposes of establishing her charges in a way that differs from how the Department defines that term for medical assistance patients, Southview has not done so here. Its Admissions Agreement with the Petitioner provides, among other things, that:

> The payment rate under the Medical Assistance Program is determined according to the resident classification the Minnesota

> Department of Health assigns to each resident based on resident assessments the facility is required to submit.[45]
>
> * * *
>
> The daily rate charged to residents who pay for their own care shall at all times be equal to the rate paid by Medical Assistance for the care of Medical Assistance residents.[46]

In summary, the underlying issue here is whether the Petitioner has been properly classified as needing a case mix category "I" level of care. The proper remedy for a private paying resident who disputes his or her case mix classification is not to withhold full payment of a facility's charges and pay only the charge associated with what he or she believes is the proper case mix classification. The remedy is to request the Department to reconsider its case mix decision — a remedy that is explained in the Admissions Agreement:

> If the facility requests reconsideration of the Resident's classification, the facility will provide written notice of the Request for Reconsideration to the Resident on the date the request is submitted to the Minnesota Department of Health. The Resident may also request reconsideration of any resident classification within thirty (30) working days of receipt of the classification. [47]

Unlike district court judges, administrative law judges have no inherent jurisdiction to hear whatever claims may arise in the contested case proceedings over which they preside. They may only make recommendations to the Commissioner about issues that the Department specifically requests them to consider. In paragraph 3 of its Notice of Hearing, the Department indicated that "[t]he hearing, requested by Petitioner, is to determine whether the reasons for the intended discharge or transfer are sufficient under sections 1819(c)(2) and 1919(c)(2) of the Social Security Act and 42 C.F.R. § 483.12." The laws cited only refer to appeals from proposed discharges to determine whether :

> [t]he resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this Title or Title XIX on the resident's behalf) for a stay at the facility.[48]

In short, the Administrative Law Judge therefore has no authority to consider in the context of this proceedings an appeal from the case mix classification that the Department has assigned to the Petitioner.

The Petitioner's husband has sought to force a change in her case mix classification by withholding full payment of the charges that Southview has billed him for her care. Since that is an inappropriate method for obtaining a reconsideration of the classification assigned to her, the Petitioner is now vulnerable to being discharged from Southview.

B. H. J.

[1] Minn. Stat. § 14.61 (1998). (Unless otherwise specified, all references to Minnesota Statutes are to the 1998 edition.)
[2] Petitioner's testimony.
[3] Id. Exhibit E.
[4] Exhibit E, p. 18.
[5] Testimony of Lance Lemieux; Exhibit A.
[6] Exhibit 1; testimony of Sandra Van Beck. Technically, those two state departments use the case mix system to determine the rates that the state pays to nursing facilities for the care of patients receiving medical assistance. However, since state law prohibits nursing facilities from having different rate structures for private paying and medical assistance residents, Southview necessarily must rely on the case mix system to establish the charges for private paying residents, such as the Petitioner here. See, e.g.,Minn. Stat. § 256B.48, subd. 1(a).
[7] Exhibits 1 and 2; testimony of Sandra Van Beck.
[8] Id.
[9] Exhibits 1 and 2.
[10] Exhibit 2.
[11] Exhibit B.
[12] Id.
[13] Exhibit A; testimony of Petitioner's husband and Lance Lemieux.
[14] Id.
[15] Testimony of Petitioner and Petitioner's husband.
[16] Id.
[17] Id.' testimony of Joan Anderson and Betty Gilbertson.
[18] Id.
[19] Testimony of Betty Gilbertson.
[20] Testimony of Joan Anderson.
[21] Testimony of Petitioner's husband and Lance Lemieux; Exhibit 3.
[22] Testimony of Sandra Van Beck.
[23] Testimony of Lance Lemieux; Exhibit s A and C.
[24] Testimony of Lance Lemieux and Petitioner's husband.
[25] Testimony of Lance Lemieux; Exhibit s A and C.
[26] Testimony of Lance Lemieux and Petitioner's husband.
[27] Exhibit F.
[28] Id.
[29] Testimony of Sheila Merz.
[30] Id.
[31] Exhibit 3.
[32] Id.
[33] Minnesota Statutes, section 14.50, and section 144A.135; Title 42, United States Code, sections 1395I-3(e) and 1396r(e) and Title 42, Code of Federal Regulations, section 483.12.
[34] Minnesota Statutes, section 144.651, subdivision 29.
[35] Sections 1819(c)(2)(B) and 1919(c)(2)(B) of the Social Security Act.; Minnesota Statutes, section 144.651, subdivision 29, and section 144.135.
[36] §§ 1819(c)(2)(A) and 1919(c)(2)(A) of the Social Security Act.
[37] *See* Minnesota Rules, part 1400.7300, subpart 5.
[38] Exhibit 1.
[39] Exhibit 2.
[40] Minnesota Statutes, section 14.62, subdivision 1.
[41] Exhibit 1.
[42] Exhibit 2.
[43] Id.
[44] *See*, e.g., Minn. Stat. § 256B.48, subd. 1(a).

[45] Exhibit E, p. 3.
[46] *Id*. at p. 5.
[47] *Id*. at p. 4.
[48] §§ 1819(c)(2)(A) and 1919(c)(2)(A) of the Social Security Act.